

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

PETER W. SHORETTE, SR.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 97-49-B
)	
RITE AID OF MAINE, INC.,)	
)	
Defendant)	

MEMORANDUM OF DECISION¹

The defendant, Rite Aid of Maine, Inc. (Rite Aid), has moved for a summary judgment on all counts of the plaintiff, Peter W. Shorette, Sr.'s, complaint. Shorette's complaint, brought after he resigned from his employment with Rite Aid, alleges age discrimination in violation of both the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 - 634 (1985 & Pamph. 1997) (ADEA), and the Maine Human Rights Act, 5 M.R.S.A. §§ 4551 - 4633 (1989 & Pamph. 1996) (MHRA); violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e - 2000h-6 (1994) (Title VII); negligent infliction of emotional distress; and breach of contract. Concluding that no genuine issues exist with respect to any material fact therein, the Court grants Rite Aid's motion for a summary judgment on Counts I and III of Shorette's complaint. The Court dismisses Counts II, IV and V for lack of subject matter jurisdiction.

I. Summary Judgment

A summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is genuine, for these purposes, if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A material fact is one which has the ‘potential to affect the outcome of the suit under applicable law.’” *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record in the light most favorable to the nonmovant. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

II. Background

In this action, Shorette claims that he essentially was forced to resign by Rite Aid on April 22, 1995, due to age discrimination. At the time of his departure, he was sixty-one years old, and had worked at LaVerdiere’s Super Drug Stores for thirty-two years (twenty-nine years of which as a store manager) prior to Rite Aid’s acquisition of the chain in September 1994. Shorette contends that, as part of the takeover, Rite Aid agreed to keep nearly all LaVerdiere’s employees on its payroll under the same terms and conditions as their previous employer, and to provide them with adequate training to perform their duties under the new management. The eldest manager at the time of the acquisition, Shorette claims he was the only manager demoted to assistant manager, the only manager not to receive complete computer training, and the only manager not to receive a manager’s name tag. Moreover, Shorette claims that one of his supervisors asked him when he was going to retire, and another asked him his age. Shorette also claims that Rite Aid asked him to drive a truck illegally.

Although he acknowledges that at least on one occasion he was spoken to by a superior regarding the need for him to speed up his work on the computer, Shorette maintains that he was making progress on the computer and was performing adequately the functions he had been taught. Shorette was transferred from one store to another in order to receive additional training on the computer. In April of 1995, Shorette was told by a superior that “Rite Aid can’t afford you . . . anymore,” and was forced to choose between being demoted to a key cashier position at the store or resigning. Shorette chose the latter option. At the time of his departure, Shorette was earning approximately \$7,000 per year more than younger managers. Rite Aid contends that it took such action against Shorette because of his lack of computer proficiency, and because it could not afford to pay him a manager’s salary in view of the fact that he was unable, despite five and one-half months of computer training, to perform satisfactorily the functions of a store manager. Shorette contends that the reason was a mere pretext, and that his age was a substantial motivating factor in the adverse employment action taken by Rite Aid.

III. Discussion

A. Whether a genuine issue exists with respect to Shorette’s claim based on the ADEA

Rite Aid contends that it is entitled to a summary judgment on Shorette’s ADEA claim because it is barred by the applicable statute of limitations or, alternatively, because Shorette has failed to generate evidence of a pretext or discriminatory animus on Rite Aid’s part. The Court considers these arguments in turn.

1. Statute of limitations

Rite Aid contends that Shorette’s complaint was untimely filed because, pursuant to 29 U.S.C. § 626(e) (Pamph. 1997), a person aggrieved by a violation of the ADEA must file an

action within ninety days of receipt of notice from the Equal Employment Opportunity Commission. Because Shorette received his notice on October 31, 1996, and did not file the current complaint until February 28, 1997, well after the deadline, Rite Aid maintains his claim is barred. Shorette contends, however, that this affirmative defense has been waived by Rite Aid because it was not set forth in its answer as required by Federal Rule of Civil Procedure 8(c). The Court agrees.

Federal Rule of Civil Procedure 8(c) requires that an affirmative defense such as the statute of limitations be set forth in the pleadings. Failure to raise the statute of limitations in an answer generally constitutes a waiver of the defense. *Conjugal Partnership v. Conjugal Partnership*, 22 F.3d 391, 400 (1st Cir. 1994). Having previously denied Rite Aid's motion to amend its answer to include the defense, the Court concludes that such a defense has, indeed, been waived; the claim is not barred due to untimeliness.²

2. Pretext or discriminatory animus on the part of Rite Aid

Rite Aid's alternative argument is that, in view of the fact that Shorette has failed to adduce any direct evidence of age discrimination on its part, he must demonstrate, pursuant to the standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973), evidence to support findings of a pretextual termination and discriminatory animus on the part of Rite Aid. Rite Aid contends that because Shorette cannot meet his burden under *McDonnell*

² Rite Aid contends in its motion that, although it did not specifically plead the defense in its answer, it sufficiently raised the issue through its general denials of those portions of the plaintiff's complaint related to timeliness. As discussed *supra*, the Court previously denied Rite Aid's motion to amend its answer to include the statute of limitations as an affirmative defense, and declines to adopt such a creative approach to satisfying the requirement of Federal Rule of Civil Procedure 8(c) now.

Douglas, it is entitled to a judgment as a matter of law on the claim.

Although Shorette contends that there is evidence of direct discrimination on the part of Rite Aid, the Court is unpersuaded. Shorette points to evidence that two of his former supervisors asked him at different times his age and when he was going to retire. But these ambiguous statements, even if true, do not amount to direct evidence of age discrimination. *Nakai v. Wickes Lumber Co.*, 906 F. Supp. 698, 705 (D. Me. 1995). The Court finds that there are no references in the record to any statements made by Rite Aid or its agents revealing age-based prejudice. The record thus is devoid of any direct evidence of age discrimination.

Absent such direct evidence of age discrimination, the burden shifting framework set forth in *McDonnell Douglas* applies. *Goldman v. First Nat. Bank of Boston*, 985 F.2d 1113, 1117 (1st Cir. 1993). First, a plaintiff must make a prima facie showing of discrimination. *Id.* Rite Aid concedes this point at this stage of the proceedings. The following standards guide the proceedings thereafter:

Establishment of the prima facie case . . . creates a presumption that the employer unlawfully discriminated against the employee, . . . and the burden of production shifts to the defendant-employer to articulate some legitimate, nondiscriminatory reason for the termination. The burden of persuasion remains with the plaintiff-employee at all times.

The presumption of unlawful age discrimination generated by the plaintiff-employee's prima facie showing dissipates, however, provided the employer sustains its burden of production; the plaintiff-employee must then demonstrate that the proffered reason for the adverse employment action was simply a pretext for age discrimination. The plaintiff must do more than cast doubt on the employer's justification for the challenged action; there must be a sufficient showing that discriminatory animus motivated the action

Under First Circuit caselaw, the plaintiff-employee must adduce minimally sufficient evidence of pretext *and* discriminatory animus. A showing that the employer's justification was not the actual motive may be enough if the facts and

circumstances raise a reasonable inference of age discrimination. Nevertheless, the plaintiff-employee cannot avert summary judgment if the record is devoid of direct *and* circumstantial evidence of discriminatory animus on the part of the employer.

Id. at 1117-1118 (internal quotations and citations omitted).

The Court concludes that Rite Aid has sustained its burden of articulating a legitimate, nondiscriminatory reason for presenting Shorette with the option of accepting a different job or resigning. Rite Aid maintains that Shorette was unable to learn the computer functions required of a store manager, despite having received five and one-half months of training. After the training period, during which time Shorette was paid a store manager's salary, he was offered a key cashier position, which Rite Aid believed could be performed by a person with Shorette's limited computer skills. Shorette declined the offer, however, and resigned shortly thereafter.

Because Rite Aid has met its burden of production with respect to evidence of a legitimate, nondiscriminatory reason for the adverse employment action, the burden next shifts back to Shorette, who must demonstrate, either through direct or circumstantial evidence, that Rite Aid's reason was a mere pretext *and* that age discrimination was the actual reason for the action taken. *Goldman*, 985 F.2d at 1117-1118; *see also Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994).

In assessing the issue of pretext, the Court's focus is on "the perception of the decisionmaker, that is, whether the employer believed its stated reason to be credible." *Id.* at 1118 (internal quotations and citations omitted). Rite Aid has presented sufficient evidence to support its assertion that it believed Shorette was unable to perform adequately as a store manager. Shorette appears to have been largely unfamiliar with computers in his capacity as a

store manager for LaVerdiere's and, subsequent to the Rite Aid takeover, he had great difficulty in mastering the basic computer functions required by Rite Aid's new system. Two of the store managers who helped train Shorette confirm that he could not adequately perform the functions required of a Rite Aid store manager. There is evidence that Rite Aid first assigned Shorette as an assistant manager to be trained in its Augusta store and then, after he continued to have difficulty mastering the new system, transferred him to the Waterville store for additional training with another individual. Shorette himself confirms that he was told by two of his supervisors that he needed to "speed up" on the computer.

Despite his contention to the contrary, Shorette has not adduced sufficient evidence to support a finding that Rite Aid did not believe its own stated reason as to why it found it necessary to demote him or ask him to resign. Although he cites a litany of "circumstances" related to his age, demotion, and computer training relative to other Rite Aid employees, Shorette has done little to refute Rite Aid's proffered justification to enable the trier of fact to conclude that his qualifications were sufficient to require his retention as a store manager. Shorette has failed to present any statistical evidence, demonstration of discriminatory corporate policies, pattern of age-related discharges or forced early retirements. *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990). His limited evidence of disparate treatment does not raise an issue to support a reasonable inference that, if it did in fact occur, it was based on an impermissible category such as age as opposed to legitimate business concerns; instead, "[a] factfinder would be left to guess at the reasons behind the pretext." *Id.* Indeed, "whatever slight shadow of doubt may have been cast upon the proffered justification for his dismissal is too faint to raise the spectre of pretext." *Goldman*, 985 F.2d at 1119. This tenuous evidence of

pretext, without more, cannot support a finding that Rite Aid's actions were motivated by age discrimination. *Medina-Munoz*, 896 F.2d at 10.

Shorette also has failed to generate sufficient evidence of discriminatory animus on the part of Rite Aid. "Evidence of age animus need not be of the 'smoking gun' variety, but the totality of the circumstances must permit a reasonable inference that the employer's justification for the challenged action was a pretext for age discrimination." *Id.* (internal quotations and citation omitted). To satisfy this requirement, a plaintiff must do more than merely refute an employer's rationale for the adverse action, *id.*, and cannot rely on "conclusory allegations, improbable inferences, and unsupported speculation" in proving his case. *Id.* at 8.

Contrary to his contention, the Court concludes that Shorette has failed to generate evidence to support a reasonable factfinder's conclusion that Rite Aid's actions toward him were motivated by an intent to discriminate against him due to his age. The Court is unable to find, based on the record, that evidence of direct or circumstantial intent to discriminate exists in this case. Shorette's reliance on the ambiguous remarks made by his former supervisors is unavailing. Such ambiguous remarks are insufficient to raise an inference of discriminatory intent. *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 481 (1st Cir. 1993). The "series of events" highlighted by Shorette in support of his position have credible age-neutral explanations, and cannot support a reasonable inference of discriminatory animus. Again, there is no evidence of any age-based derogatory statements or any statements connecting Rite Aid's actions with Shorette's age. In short, Shorette's evidence boils down to speculation that age discrimination was the motivating factor behind Rite Aid's decision to offer him a demotion or ask him to resign. Such evidence is insufficient to support a finding that Rite Aid's action was motivated by anything other than to

retain as store managers those individuals who could competently perform the computer functions required for the position.

The evidence presented illustrates that Rite Aid went to great lengths to train Shorette and to assist him in working towards promotion to a store manager position. He was trained at two different stores with two different individuals for a five and one-half month period prior to his eventual resignation. Thus, "[t]here is no direct evidence that considerations of age, as distinguished from neutral cost-saving considerations, entered into the decision" *Goldman*, 985 F.2d at 1120. Shorette's contentions that he did not receive adequate training, or even that he did perform computer functions adequately, do not suffice to raise a genuine issue with respect to discriminatory animus. In view of the fact that Shorette has established neither pretext nor age animus on the part of Rite Aid, the Court grants Rite Aid's motion for a summary judgment on Count I of the complaint.

B. Whether a genuine issue exists with respect to Shorette's Title VII claim

Shorette has asserted a claim in Count III of his complaint pursuant to Title VII. Shorette concedes, as he must, that he does not have a cause of action for age discrimination pursuant to this statute. Instead, he asserts the claim in order to preserve those remedies made available under Title VII as guaranteed by the ADEA. In view of the Court's ruling with respect to Shorette's ADEA claim, however, this claim is moot, and, accordingly, a summary judgment in Rite Aid's favor is granted on Count III, as well.

C. Shorette's MHRA, negligent infliction of emotional distress, and contract claims

Rite Aid also seeks a summary judgment on Count II, Count IV, and Count V of Shorette's complaint, in which he seeks recovery pursuant to the MHRA, and damages for

negligent infliction of emotional distress and breach of contract.

Inasmuch as these remaining counts arise under state law, however, the Court concludes that they should be dismissed for lack of subject matter jurisdiction. *Astrowsky v. First Portland Mtg. Corp.*, 887 F. Supp. 332, 337 (D. Me. 1995). Accordingly, Counts II, IV, and V of Shorette's complaint are dismissed.

IV. Conclusion

For the foregoing reasons, the defendant, Rite Aid's, motion for summary judgments on Counts I and III of the plaintiff, Peter W. Shorette, Sr.'s, complaint is **GRANTED**. Counts II, IV and V of the complaint are **DISMISSED** for lack of subject matter jurisdiction.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated this 24th day of November, 1997.